

COPY

COURT OF APPEALS OF THE STATE OF MISSISSIPPI

NO. 2009-CA-00126-COA

FILED

REBUILD AMERICA, INC.

APPELLANT

V.

SEP 15 2009
OFFICE OF THE CLERK
SUPREME COURT
COURT OF APPEALS

ESTATE OF DANIEL A. WRIGHT, DECEASED

APPELLEE

**APPEAL FROM THE CHANCERY COURT OF HINDS COUNTY,
MISSISSIPPI, FIRST JUDICIAL DISTRICT**

**REPLY BRIEF OF THE APPELLANT,
REBUILD AMERICA, INC.**

ORAL ARGUMENT REQUESTED

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I. REPLY TO APPELLEE'S BRIEF

A. Summary

The Chancery Clerk of Hinds County, Mississippi, strictly complied with the mandates of Mississippi Code Annotated § 27-43-3 which requires reversal of the chancery court's erroneous decision to grant the Estate of Daniel Wright (hereinafter referred to as "Wright") a judgment as a matter of law. Despite the unsuccessful attempt to personally serve Wright with the redemption notice, the chancery clerk fulfilled her remaining duties in strict compliance with Mississippi law. The Mississippi Code unambiguously provides that the failure of the landowner to receive actual notice shall not void the tax sale provided the chancery clerk has fulfilled his/her remaining duties under the statute. The chancery clerk properly noticed Wright via certified mail and publication and took the additional steps of searching and inquiring to ascertain an alternate address for Wright. After the search and inquiry, the clerk completed and filed an "Affidavit" documenting her unsuccessful efforts to find an alternate address for Wright. Accordingly, the chancery court's decision must be reversed with a judgment as a matter of law rendered in favor of Rebuild America, Inc. (hereinafter referred to as "Rebuild America") with title to the subject property being confirmed in Rebuild America.

In the alternative, a de novo review of the record reveals Wright has not meet his burden of proving that no genuine issue of material fact exists. Wright's burden of proof must be satisfied prior to shifting the burden to Rebuild America to present probative evidence of the existence of a triable issue of fact. In light of the contradicting evidence and factual dispute of whether the chancery clerk checked the telephone book(s) or land roll records and what steps were taken thereafter, a genuine issue of material fact exists precluding a judgment as a matter of

law being entered in favor of Wright.

In the unlikely event this Court affirms the chancery court's decision, Rebuild America properly plead and requested monetary relief for reimbursement for the payment of taxes, statutory interest, and expenses. The chancery court granted Wright summary judgment on the issue of whether the tax sale was void and instructed a Final Judgment be submitted without entertaining Rebuild America's request for reimbursement of the payment of taxes, interest and expenses. In considering all of the pleadings, depositions, affidavits, answers to interrogatories, and admissions, Rebuild America was entitled to a judgment in an amount equal to its payment of the property taxes plus interest and expenses if the chancery court properly set aside the tax deed. At a minimum, this matter should be remanded to the trial court for a determination of the amount Rebuild America is owed for paying Wright's 2004 property taxes which he failed to pay despite being properly notified.

B. The Chancery Clerk of Hinds County, Mississippi strictly complied with the procedures set forth in Mississippi Code Annotated § 27-43-3 (1972).

Mississippi Code Annotated § 27-43-3 unambiguously sets forth the duties of the chancery clerk in notifying a delinquent taxpayer of the expiration of the period during which the taxpayer may redeem or pay past due property taxes before the tax sale is absolute in the purchaser. The statute requires notice to be given by personal service, mail, and publication. Miss. Code Ann. § 27-43-3 (1972). Admittedly, this Court has pronounced "all three forms of notice are required under the statute in order for the tax sale to be valid." *Viking Investments, LLC v. Addison Body Shop, Inc.*, 931 So.2d 679, 681 (Miss.Ct.App.2006). However, all three forms of notice are not required to be perfected in order for the tax sale to be valid. The statute anticipates situations where the taxpayer is unable to be found at the property address and

provides a procedure for the clerk to follow to attempt to find an alternate address for the taxpayer. The procedure set forth by the legislature requires for the clerk to further search and inquire for an alternate address of the taxpayer and to file an affidavit specifying the acts of such search and inquiry. Miss. Code Ann. § 27-43-3 (1972). The clerk shall thereafter file said affidavit as a permanent record in the office of the clerk. *Id.* While the three forms of notice (personal service, mail, and publication) are required to be attempted, the statute relieves perfection of all three forms so long as the clerk follows the other procedural safeguards.

According to the records on file with the Chancery Clerk of Hinds County, the clerk did *exactly* what Miss. Code Ann. § 27-43-3 requires. No dispute exists whether the Chancery Clerk properly notified Wright of the expiration of the redemption period by certified mail and publication. Notice by mail and publication were perfected. Wright admits to receiving notice by certified mail and publication, but relies on the alleged lack of personal service to avoid forfeiture of the property. Admittedly, notice by personal service was returned undeliverable. However, pursuant to Miss. Code Ann. § 27-43-3, the lack of personal service does not invalidate the clerk's conveyance.

According to the plain and unambiguous language of the statute, the clerk's duty to further search and inquire as to an alternate address for the owner is only triggered if both the notice by mail and the personal notice are returned not found. Miss. Code Ann. § 27-43-3 (1972). A strict interpretation, which this Court applies, relieves the clerk of the duty to further search and inquire for an alternate address if either of the above notices are perfected. *See Lamar Life Ins. Co. v. Mente & Co., Inc.*, 181 Miss. 479, 480 (1938); *See also Lawrence v. Rankin*, 870 So.2d 673, 676 (Miss.Ct.App.2003). This Court's inquiry should cease and summary judgment should have been granted in favor of Rebuild America upon presentation of

the documented proof that Wright received notice of the expiration of the redemption period via certified mail from the chancery clerk on June 5, 2007. Upon said certified mail being delivered, signed and accepted, the clerk had no duty under Miss. Code Ann. § 24-43-3 to further search and inquire as to an alternate address of Wright. The remaining steps taken by the clerk in the case *sub judice* were over and above what is required by statute when returned proof of service of notice has been received by the clerk. Based upon this issue alone, Rebuild America is entitled to a judgment as a matter of law and the additional steps taken by the clerk were unnecessary under Miss. Code Ann. § 24-43-3.

Despite having no obligation, the clerk further searched and inquired for an alternate address for Wright¹. Having found no alternate address for the taxpayer, Daniel A. Wright, the clerk completed an affidavit documenting the additional search an inquiry. The affidavit was filed of record on September 19, 2007. The Chancery Clerk of Hinds County made no deviation from the procedures set forth in Miss. Code Ann. § 27-43-3, and the clerk's strict compliance therewith requires reversal of the chancery court's decision.

C. The "AFFIDAVIT".

Upon return of the sheriff's attempt to personally serve Wright, the Hinds County Chancery Clerk, Eddie Jean Carr, executed an "Affidavit" stating she had made a diligent effort to locate Wright by looking in the phone directory, the city tax directory, and other methods. (R. at 15.) Despite the heading of the document states "AFFIDAVIT," the Appellee ignores the form drafted by the clerk and refers to the same document as a "certification" in effort to

¹ Which begs the question why would the chancery clerk search for an alternate address when notice by mail was perfected by using the address which was on file? Rebuild America respectfully submits this is precisely why the additional search and inquiry is not required by statute unless both personal service and mail are undeliverable.

persuade this Court that the clerk failed to perform her duties under the law. (Appellee's Brief at 4-5). The Appellee's attempt to reclassify or redraft documents to fit his agenda on appeal should be ignored. However, no matter how Wright mislabels the facts, he cannot avoid the well-documented efforts of the chancery clerk and the "Affidavit" executed certifying to the additional steps the clerk took to locate the taxpayer. The additional efforts taken by the chancery clerk distinguish this case from the facts of *Viking* and require this Court to reverse the chancery court's decision.

Furthermore, the Appellee interjects that the affidavit is undated and there is no evidence as to when the affidavit was prepared or signed to challenge its validity. (Appellee's Brief at 5 and 12.) However, the Appellee fails to cite any authority which would make the date of the execution of the affidavit relevant. The controlling statute, Mississippi Code Annotated § 27-43-3, does not require the clerk's search to be performed at any specific time other than after the personal notice and certified mail have been returned undeliverable. The affidavit upon its face demonstrates it was filed of record on September 19, 2007. If any relevance at all, the lack of the exact date the affidavit was prepared or signed creates an unresolved genuine issue of material fact which the trial court ignored in granting Wright's motion for summary judgment.

D. Daniel A. Wright did not satisfy his burden of proving no genuine issue of material fact exists as to whether the chancery clerk failed to perform her statutory duties.

In viewing the evidence in the light most favorable to Rebuild America, Wright failed to meet his burden of proving no genuine issue of material fact exists. *Tucker v. Hinds County*, 558 So.2d 869, 872 (Miss.1990); *Russell v. Orr*, 700 So.2d 619, 622 (Miss.1997). Despite the Appellee's suggestion to the contrary, Rebuild America is not

obligated to present “significant probative evidence demonstrating the existence of [a] triable issue of fact” prior to Wright satisfying his burden of proof. (Appellee’s Brief at 12). The non-moving party’s burden of rebuttal arises “only after the moving party has satisfied its burden of proving that no genuine issue of material fact exists.” *Foster v. Noel*, 715 So.2d 174, 180 (Miss.1998). In light of the contradicting evidence, genuine issues of material fact exists which bars Wright’s entitlement to a judgment as a matter of law.

According to the records on file with the Chancery Clerk of Hinds County, Mississippi, the clerk completed and recorded an affidavit which documented the clerk’s search and inquiry for an alternate address of Wright. (R. at 15). The clerk certified that she checked the telephone directories, city tax roll, and other methods. This Court has previously stated the courts “have a right to expect that when any one, but especially a public official, signs an affidavit under oath, the statements and allegations contained in the affidavit will in fact be true.” *Rush v. Wallace Rentals, LLC*, 837 So.2d 191, 200 (Miss.2003). Wright produced **nothing** which would have been available to the clerk at that time which displayed the taxpayer’s name, Daniel A. Wright. Wright presented a June 2008 telephone directory, a March 7, 2008, landroll statement, and a 2006-2007 telephone directory. (R. at 176-180) Rebuild America respectfully submits that the presentation of two after the fact documents and one telephone directory from 2006-2007 is not sufficient to satisfy the heavy burden of proving no genuine issue of material fact exists in light of the clerk’s contradicting affidavit. Moreover, the trial court should have given deference to the clerk’s affidavit and records since the evidence is supposed to be viewed in the light most favorable to the party against whom the motion is made. *Russell*

v. *Orr*, 700 So.2d 619, 622 (Miss.1997).

Once again, the Appellee did not produce anything that provided an alternate address for “Daniel A. Wright.” Instead, the Appellee produced an after the fact 2008 tax roll statement which displayed the name, “Dan A. Wright.” (R. at 176.) This evidence would not have been available to the clerk in 2007. The Appellee further produced a 2006-2007 and a June 2008 telephone directory displaying the name, “Dan Wright” (not “Dan A. Wright” as the Appellee’s Brief erroneously asserts on page 13). (R. at 177-78.) The same telephone directories produced by the Appellee list other “Daniel” Wrights and alternate addresses, however, these persons were not the delinquent taxpayer the clerk was attempting to find. The Appellee suggests that it was probable that “Dan A. Wright” and “Daniel A. Wright” are one and the same person, but the 2008 tax roll is the **only** evidence produced by the Appellee with the name “Dan A. Wright” and, obviously, it would not be available to the clerk in 2007.

The Appellee attempts to diminish the efforts taken by the clerk in suggesting that more than creating and checking off a checklist is required. However, our Supreme Court has suggested this is exactly what the chancery clerks should do to satisfy their statutory obligation. *See Rush*, 837 So.2d at 200 (“As a matter of suggestion, the chancery clerks could perhaps consider a ‘check list’ form affidavit containing a general list of the description of actions normally taken in a search and inquiry, and then merely ‘check off’ on the list the action actually taken in any particular search and inquiry.”).

Perhaps even more astonishing, the chancery court granted summary judgment to Wright without any testimony from the chancery clerk or a representative of the clerk’s office. Absolutely no inquiry was required by chancery court as to what procedures the

clerk followed if in fact she did come across the names Dan and Daniel Wright in the phonebook. Furthermore, no testimony was required to see if in fact the clerk checked the landroll records and what the 2007 landroll records reflected. No inquiry into the facts set forth in the chancery clerk's affidavit was required by the court. Instead, the chancery court resolved all of these questions of fact in favor of Wright and granted him a judgment as a matter of law. Rebuild America submits that all of these unresolved questions are genuine issues of material fact which require reversal of the chancery court's erroneous decision.

E. Rebuild America, Inc.'s request for damages and interest pursuant to Mississippi Code Annotated §§ 27-45-3 and 27-45-27 (1972) was presented to the trial court and this issue is not raised for the first time in this appeal.

In 2005, the property which is the subject of this appeal was sold for taxes due for the fiscal year of 2004 to Wachovia Cust Sass Muni V DIR (hereinafter referred to as "Sass Muni"). The parties do not dispute that Wright failed to pay the 2004 county property taxes. After the taxes remained unpaid for over two and half years, the Chancery Clerk of Hinds County issued a tax deed to Sass Muni who subsequently assigned their interest in the property (including the tax payment plus interest) to Rebuild America. Pursuant to Miss. Code Ann. § 11-17-19, Rebuild America filed its Complaint to Quiet and Confirm Tax Title which included an alternative prayer for relief which stated as follows:

Should this Court deem any notice insufficient or any party file an appearance, answer or other responsive pleading, and upon final hearing hereof, the Tax Deed and subsequent conveyance be set aside, Plaintiff requests all court costs expenses, including reasonable attorney's fees, in addition to reimbursement of all tax payments, including eight percent (8%) interest thereon.

(See Rebuild America's Complaint, R. at 5.) Despite such prayer for relief, the chancery court

ignored Rebuild America's request and confirmed title to the property in Wright, voided the tax deed, and granted Wright a year's worth of property taxes at the expense of the tax purchaser. As addressed by this Court before, the chancellor's decision in not awarding damages and interest to the tax purchaser is clear error. *See Lawrence*, 870 So.2d at 676-77.

The Appellee, in an attempt to avoid paying his 2004 property taxes, suggests that Rebuild America never raised this issue at the trial court level. As set forth above, Rebuild America raised the issue in its **first and initial pleading and prayer for relief**. The Appellee further erroneously alleges that "[n]o where in the motions, responses to motions, or at the hearing on the motions for summary judgment is the claim for damages and interest mentioned." (Appellee's Brief at 17.) However, Rebuild America's motion for summary judgment states, "In support of its Motion, Plaintiff offers the following exhibits **incorporated herein by reference**: . . . 6. Complaint to Quiet and Confirm Tax Title . . . attached hereto as Exhibit "F" . . ." (emphasis added) (R. at 121-22). If pleading and requesting for such relief in its complaint was insufficient, Rebuild America's renewed request in its motion for summary judgment should have reminded the Court, if it were unaware, that Rebuild America requested reimbursement for the taxes it paid plus the interest to which it is entitled. The fact that Rebuild America raised this issue in its initial pleading and again in its motion for summary judgment preserves said issue for review on appeal. Accordingly, Rebuild America in this appeal is requesting for the third time for such relief, not the first.

Additionally, the chancery court's duty in determining whether to grant a judgment as a matter of law is to consider all of the "pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

Miss.R.Civ.Pro. 56(c). A review of the pleadings, including the first one in the file, unambiguously reveals a request for reimbursement of the taxes paid and interest accrued by Rebuild America if the Court decided to void the Tax Deed issued by the chancery clerk. Due to the clear error committed by the chancery court, this matter should be remanded to the trial court for a determination of the damages and interest which even the Appellee admits Rebuild America is entitled. (See Appellee's Brief at 17.)

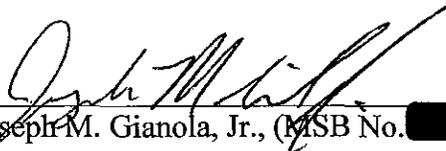
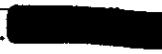
II. CONCLUSION

The Chancery Clerk of Hinds County, Mississippi strictly complied with the statutory mandates of Miss. Code Ann. § 27-43-3 in issuing notice to Wright by personal service, mail, and publication. Upon receipt of the signed certified mail receipt, the chancery clerk had satisfied her duties under the statute in assuring Wright received notice. The clerk then took the additional and unnecessary step of searching and inquiring for an alternate address of Wright and executed and recorded an affidavit certifying to the same. The aforementioned notices and acts strictly comply with the plain and unambiguous language of the applicable statute. The chancery court's decision in granting Wright summary judgment is erroneous and must be reversed with a decision rendered in favor of Rebuild America, Inc. The Tax Deed issued by the Chancery Clerk of Hinds County, Mississippi, should be upheld and title confirmed in Rebuild America, Inc. Alternatively, Wright has not satisfied his burden of proving no genuine issues of material fact exists as to whether the chancery clerk conducted a diligent search an inquiry. In viewing the evidence and facts in a light most favorable to Rebuild America, absolutely no legal basis exists for finding Wright was entitled to prevail as a matter of law. Finally, Rebuild America submits for the third time that it is entitled to monetary relief for reimbursement of taxes, interest, and expenses it paid due to Wright's failure to pay his property taxes. In the event this Court upholds

the chancery court's summary judgment order, Rebuild America respectfully requests that this matter be remanded for a determination of the amount of damages it is owed, with all costs of this appeal being assessed to the Appellee.

RESPECTFULLY SUBMITTED, this the 15th day of September, 2009.

REBUILD AMERICA, INC.

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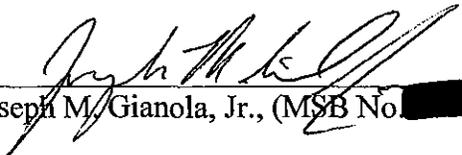
CERTIFICATE OF SERVICE

I, Joseph M. Gianola, Jr., attorney for Rebuild America, Inc., do hereby certify that I have this day served via United States Mail, postage prepaid, a true and correct copy of the above and foregoing Reply Brief of Appellant to the following:

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Honorable William H. Singletary
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THIS, the 15th day of September, 2009.



Joseph M. Gianola, Jr., (MSB No. [REDACTED])